

‘Celebrating’ a Decade of Legalised Torture in Israel

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Abstract

This article describes and analyses a key ruling by Israel’s Supreme Court, issued in September 1999, that concerns the lawfulness of methods used by the General Security Service (GSS) in interrogating Palestinian terrorist suspects. By creating a ‘ticking bomb’ exception to the prohibition on torture, the ruling legalised torture in Israel and created a system whereby torture is institutionalised. The article describes a number of interrogation methods that the GSS uses; under international legal definitions these may, and in practice do, amount to torture. I submit that the Supreme Court ruling and the system it has created are at loggerheads, both with international law and with the moral values that underline it.

1. Introduction

If it is the judge who has offended against you, who will you complain to? – Arab proverb

On 6 September 2009, a decade had passed since Israel’s Supreme Court issued its ruling on the interrogation of terrorist suspects by the General Security Service (GSS)¹ in *The Public Committee against Torture in Israel v Government of Israel et al.*² In discussing the ruling, and the state of affairs it created, this article attempts to justify the controversial claims within its title: namely that (i) since this ruling, torture in Israel has been legalised, (ii) the interrogation methods used by the GSS in the wake of this ruling constitute torture, and (iii) despite strong support for the Court’s approach within Israel, and some support without, this anniversary is no cause for celebration.

To complete this introduction I will provide a short description of the background to the 1999 ruling (the Torture Case), including an exploration of the less controversial aspects of it, is needed to understand how the ruling came to be made. In the ruling, the Court addressed a system, established in 1987 when the government adopted the recommendations of the ‘Commission of Inquiry in the matter of Interrogation Methods of the General Security Service

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¹ Official Israeli documents in English refer to this body as the ‘Israel Security Agency (ISA)’, but ‘General Security Service’ is an accurate translation of its Hebrew name, and will be used here.

² HCJ 5100/94. This ruling will be referred to as ‘the ruling’.

regarding Hostile Terrorist Activity’,³ which was headed by retired President of the Supreme Court, Moshe Landau. At the legal heart of that system was the claim that the ‘defence of necessity’ in Israel’s Penal Law could form the basis, not only for the use of force and psychological pressure in the interrogation of suspected terrorists, but also for otherwise illegal interrogation methods to be ‘defined and limited *in advance*, by way of binding instructions.’⁴ The Landau Commission recommended the use of ‘methods combining non-violent psychological pressure of an intense and prolonged interrogation ... with a moderate measure of physical pressure’.⁵ The Commission then went on to convert these abstract concepts into the concrete: in an annex to its report, which has remained a state secret to this day, it detailed specific interrogation methods for the GSS to employ. However, these methods were subsequently used against tens of thousands of Palestinian detainees⁶ - the overwhelming majority of whom were subsequently released - and described in hundreds of court, including Supreme Court, cases, as well as in human rights NGO and media reports, so by the time the Supreme Court finally decided to examine this system in earnest, the Landau-cum-GSS’s methods were a matter of public knowledge.

Writing for the Court in the Torture Case ruling, its (then) President, Aharon Barak, posed two questions at the outset: whether GSS agents were authorised to interrogate suspects, and whether the sanctioning of interrogation methods, such as ‘shaking’ and the ‘*Shabach*’ position, applied under directives and permitted on the basis of being ‘deemed immediately necessary for saving human lives’, was lawful.⁷ He answered these questions by stating that GSS agents may be authorised to interrogate (para. 20), but such authority is limited to ‘ordinary’, ‘reasonable’, or ‘regular’ interrogation (e.g. para. 21-3 and 32): in other words, interrogation ‘free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever’ (para. 23). As for the ‘defence of necessity’, its ‘very nature... does not allow it to serve as the source of a general administrative power’ (para. 36).

This was, as the Court itself declared, ‘in perfect accord with (various) International Law treaties to which Israel is a signatory – which prohibit the use of torture, “cruel, inhuman treatment” and “degrading treatment”’ (para. 23). However, the picture changed significantly when the Court turned its attention to ‘ticking time-bomb’ situations (TBS). These the Court defines (or describes), while recounting a hearing in this case, as follows:

We asked the applicants’ attorneys whether the ‘ticking time bomb’ rationale was not sufficiently persuasive to justify the use of physical means, for instance, when a bomb is

³ *Report of the Commission of Inquiry in the matter of Interrogation Methods of the General Security Service regarding Hostile Terrorist Activity*, First Part [Hebrew] (Jerusalem: October, 1987). For extensive excerpts of the Government Press Office translation of the report, see (1989) *Israel Law Review* 23, p.146. For brevity, the Commission will be referred to as ‘the Landau Commission’.

⁴ *Report of the Commission of Inquiry*, para. 3(16). See fn.3.

⁵ *Report of the Commission of Inquiry*, para. 4(7). See fn.3.

⁶ Michael Ben-Yair, the Attorney-General at the time, stated, as early as the beginning of 1995, that between 1987 and January 1995, some 23,000 Palestinians had been interrogated by the GSS (quoted in *Haaretz* [15 January 1995]). Later that year, following the death of a Palestinian detainee as a result of the ‘shaking’ method, the then Prime Minister, Yitzhak Rabin, stated that this method had been used against 8,000 Palestinians: see the *Haaretz* and *Davar* daily newspapers of 30 July 1995.

⁷ See Introduction to the Ruling.

known to have been placed in a public area and will undoubtedly explode causing immeasurable human tragedy if its location is not revealed at once.⁸

What the Court ruled as regards interrogations in such situations created what I have termed a ‘model of legalized torture’;⁹ this model is now ten years old.

2. The Ruling on ‘Ticking Bomb’ Torture: Legalisation by exemption

In its ruling in the Torture Case, the Supreme Court discussed the lawfulness, as well as the ‘Ethics’ of torturing in ‘instances of “ticking time-bombs”’ in a crucial paragraph (34). To be clear, the Court prefers the term ‘apply[ing] physical interrogation methods’; the word ‘torture’ is absent from the ‘ticking bomb’ discussion, as is – no less significantly – any mention of international law. However, the expression that the Court prefers, while restricted (unlike accepted legal definitions of torture) to the ‘physical’ is (like all such definitions) not restricted by any considerations such as humanity. Moreover, both the Landau-approved methods that the Court describes, and the ones that its ruling engendered, have been found by UN bodies and experts to constitute torture: a point which will be revisited below. I therefore believe that it would not be unreflective of the Court’s ruling to do away with its euphemisms.

Citing a string of sources that argue either for or against the ‘ethics’ of torturing in ‘ticking time-bomb’ situations, the Court proceeded to rule that ‘This matter, however, has already been decided under Israeli law. Israel’s Penal Law recognizes the “necessity” defence’ (para. 34).

The Court, then, follows the Landau Commission in ruling in favour of a torture-justifying ‘lesser evil’ moral view,¹⁰ with the ‘defence of necessity’ as its legal corollary. The difference is that, for the Court, that defence cannot allow *ex ante* regulations, being applicable only *ex post facto* and only to individual interrogators who torture in ‘ticking time-bomb’ situations.¹¹ A more restrictive view of the ‘defence of necessity’ would have led the Court to rule that this defence was *not* ‘open’ to torturers, at least not as justification.¹² It should also be pointed out that the Court starts the paragraph with a less than fully committed tone, to wit: ‘[w]e are prepared to assume that ... the “necessity” defence is open to all, particularly an investigator.’ At the end of

⁸ Para. 14. See also para. 33 for a longer definition, which the Court attributes to the State Attorney. Also see Yuval Ginbar, *Why not Torture Terrorists? Moral, societal and legal aspects of the ‘ticking bomb’ justification for torture in the struggle against terrorism* (Oxford: Oxford University Press, 2008), where the ticking bomb scenario is discussed throughout, and defined more thoroughly, for instance pp.3-6 (as a moral problem facing an individual), and pp.95-97 (as a problem of public morality facing a state). See also the Annex (p.357 onwards) where a selection of descriptions of the TBS from various sources is provided.

⁹ See Ginbar, *Why not Torture Terrorists?*, Part III, where a number of such models are described and analysed, and on which analysis this article is, to a large extent, based.

¹⁰ The Court uses the term ‘lesser evil’ later (para. 36), when citing, in this case approvingly, the Landau Commission. It should be noted that the Commission discussed the ‘defence of necessity’ (as a ‘lesser evil’ defence) in a chapter (Chapter 3) entitled ‘Legal and Moral Aspects’.

¹¹ The Landau Commission allowed the employment of its recommended interrogation methods in much wider situations.

¹² Arguably, a defence of the excusatory type would be available to an interrogator who ‘loses it’ or, in the words of the Nuremberg Court (and, subsequently, others), is deemed to have been deprived of ‘a moral choice as to his course of action.’ *US v Krauch et al.* (Case no 6: the Farben case) *Trials of War Criminals Volume VIII* 1081 (1950), p.1179. See the discussion in Ginbar, *Why Not Torture Terrorists?*, pp.311-314, 326-338. See fn.8. As explained there, the nature of such a defence would render it irrelevant to this discussion.

the paragraph, the Court abandons this tone in favour of an unambiguous one: ‘this matter ... has already been decided under Israeli law’.

It has been suggested that the Supreme Court is merely reiterating a general legal situation already created by the Legislature and that is, therefore, binding on the courts. The text, however, indicates otherwise on two counts. First, the Court concludes that ‘Israel’s Penal Law recognises the “necessity” defence’ – but, out of context, this is a redundant statement of an undisputed statutory fact. What *was* disputed was the availability of this defence to torturers in a TBS. Therefore, the Court’s declaration of the ‘matter’ as already ‘decided’ can only be understood as siding with those who have argued in favour: in other words, it constituted a determination that this defence *would* apply to such torturers, if its conditions were met. Second, I use ‘determination’ rather than ‘statement’ advisedly here because the Penal Law, while providing for the ‘defence [or ‘exemption’] of necessity’, did *not* categorise it as having an unlimited scope.¹³ In fact, the Landau Commission itself had no qualms about ‘capping’ this defence by declaring that interrogators charged with perjury ‘cannot rely on the defence of necessity’, as perjury is ‘a manifestly illegal act, above which flies that black flag saying: “prohibited.”’¹⁴ There was nothing to stop Israel’s highest Court, having cited the absolute prohibition on all acts of torture and ill-treatment in treaties to which Israel was party, from declaring that the same ‘black flag’ flies above these acts.¹⁵ Instead, the Court *chose* to interpret the ‘defence of necessity’ as providing torturers in a TBS with an escape route.

Moreover, the Supreme Court did not stop at determining that torturers may be exempted from punishment under the ‘defence of necessity’ in pure legal theory, but, instead, went on to issue instructions as to how this exemption was to be applied in practice. The Court ordered, unequivocally, that where a GSS interrogator has tortured (not the term used), ‘[h]is potential criminal liability shall be examined in the context of the “necessity” defence’ (para. 38), and suggested that the Attorney-General ‘instruct himself’ as to when this defence would be used to shield GSS interrogators not merely from punishment but from prosecution altogether.

A detailed description of the system developed under the ruling, to ensure that no GSS torturer suffers even the inconvenience of a criminal investigation, is beyond the scope of this article.¹⁶ The fate of complaints by the Israeli human rights NGO still carrying out the overwhelming majority of work in defending Palestinian detainees under GSS interrogation, the Public Committee Against Torture in Israel (PCATI), illustrates the robustness, indeed impregnability, of this system. What PCATI receives in response to its complaints of torture where no ‘ticking bomb’ has been determined, is either a flat denial of the complaints or, in the case of sleep deprivation or shackling, a claim that these were not used as interrogation techniques but because ‘this was necessitated by the gravity of the suspicions against the complainant and the urgency of obtaining the information he possessed’¹⁷ (in relation to sleep deprivation) and because of the

¹³ Or, more precisely, as what I call ‘an uncapped “lesser evil” justificatory defence.’ See Ginbar, *Why Not Torture Terrorists?*, Part IV, Chapter 19. See fn.8.

¹⁴ Landau Commission’s report, para. 4(22). See fn.3.

¹⁵ The Knesset could then, if it disagreed, attempt to impose a different interpretation through legislation.

¹⁶ See, for example, Ginbar, *Why Not Torture Terrorists?*, pp.213-214, see fn.8, and ‘Conclusions’, in Public Committee Against Torture in Israel, *Ticking Bombs – Testimonies of Torture Victims in Israel* (Jerusalem: PCATI, otherwise written by Noam Hoffstadter, May 2007).

¹⁷ Letter no 171-87-2005 to PCATI from Advocate Dudi Zakariya, of the State Prosecutor’s Office, concerning Bassem Nassar Nasr Sha’rawi, (23 January 2005), in which he confirms that ‘the complainant was interrogated for 5 days during which he was interrogated for 28 consecutive hours.’ Both quotations are from para. 5.

necessity of ‘ensuring the physical safety of interrogators and IPS personnel... and preventing escape from detention’,¹⁸ (in relation to shackling).

A short, three-point digression is called for regarding these two alleged non-methods. First, I should clarify that the State Prosecutor’s Office is exploiting, and relying upon, loopholes left by the Supreme Court ruling in the Torture Case, which used similar formulae to justify ‘cuffing ...for the purpose of preserving the investigators’ safety’ and sleep deprivation that is a ‘side effect’ of ‘prolonged interrogation’, as opposed to its being imposed ‘intentionally... for a prolonged period of time, for the purpose of tiring him [the detainee] out or “breaking him”.’¹⁹

Second, the shaky grounds for the GSS’ claim of ‘side effects’ have been publicly exposed in relation to two cases. Magistrates’ Court Justice Haim Lahovitzki was not impressed by the claim that GSS interrogators shackled a detainee ‘for the security of the interrogators.’²⁰ At the end of his decision on extending the detention of Jihad Shuman, he made the following comment:

As an aside, let the following be said: The Respondent [Shuman] claims, through his attorney, that even today, during his interrogations, his interrogators regularly shackle him with his hands behind his back. When Advocate Tzemel posed a question to the police representative on this matter, the latter responded that it was done for reasons of his [Shuman’s] interrogators’ security. *I tend to doubt this argument*[.]²¹

Regarding sleep deprivation, according to GSS interrogation logs obtained by an Israeli newspaper, a GSS interrogator told a high-ranking Palestinian detainee the following: ‘We will not let you sleep unless you confess at least in bullet points to all of the operations for which you are responsible.’²² Both sleep deprivation and shackling have, at least on occasion, been used as interrogation methods ‘proper’. Third, under the Supreme Court ruling the ‘side effect’ restrictions apply to ‘reasonable interrogation’ only. When it comes to ‘ticking bombs’ the Court imposes no restrictions on interrogation methods whatsoever; it is only the requirements of the ‘defence of necessity’ (that is, that the methods were immediately necessary in order to find the bomb, save lives, etc.) that have to be met.

Returning to the State’s response to torture victims’ complaints, where GSS interrogators determined that a TBS did exist, and went on to apply their ‘extraordinary measures’ (or torture), PCATI invariably receives an official response in a ‘boiler-plate’, identical formula:

Every one of the complainant’s claims was examined. The examination revealed that Mr. [relevant name] was arrested for interrogation due to a grave suspicion against him that was based on reliable information, according to which he was allegedly involved in or

¹⁸ On this method, see Public Committee Against Torture in Israel, *Shackling as Ill-treatment and Torture* [Hebrew] (Jerusalem: PCATI, June 2009). For the English version (not used here) see http://www.stoptorture.org.il/files/eng_report.pdf. Last accessed 13 July 2009. The quotation is from Letter to PCATI from Ilana Mann, Public Affairs Department, Prime Minister’s Office, 11 February 2009 in *Shackling as Ill-treatment and Torture*, p.24.

¹⁹ Torture Case ruling, para. 26 and 31, respectively.

²⁰ Jerusalem Magistrate’s Court, *M 007453/01 Israel Police v. Shuman Jihad*, 2 February 2001, *Minutes*, 7.

²¹ *Israel Police v. Shuman Jihad*, Decision per Justice Haim Lahovitzki, p.9. Emphasis added.

²² No’am ‘Amit, ‘Barghuti in the GSS Dungeons’, *Maariv Supplement*, 18 October 2002.

assisted in carrying out serious terrorist activities that were liable to have been carried out in the very near future, and which could have injured or endangered human life.²³

What always follows, in a similarly consistent, indeed uniform, fashion, are details of the subsequent repercussions, or rather lack thereof, for the torturing GSS interrogators: ‘it was decided that the findings of the GSS Ombudsman do not warrant taking legal, disciplinary or other measures against any of the GSS interrogators.’²⁴

It should be mentioned that, in two early cases, the State Prosecutor’s Office added to these statements that ‘the interrogation ... was conducted while he [the detainee] was considered as being suspected as a “ticking bomb”[sic]’ and the Office found that ‘the interrogation means used fall under the defence of “necessity”’.²⁵ Thereafter, however, these terms disappeared from the Office’s letters, but they have continued to be used elsewhere, not least by GSS interrogators and courts,²⁶ and even by the Supreme Court.²⁷

A further illustration of this crucial point – that GSS torturers enjoy total impunity, with this impunity serving as the means by which torture has been legalised in Israel – is provided in the following official figures, provided to the UN Rapporteur on human rights and counterterrorism: ‘According to the statistics given to the Special Rapporteur, since 2000, the inspector²⁸ has initiated more than 550 examinations, but only 4 have resulted in disciplinary measures and not a single one in prosecution.’²⁹

Trawling through Israel’s law-books looking for any mention – indeed any *hint* - of torture being lawful would prove fruitless.³⁰ Nor would digging for secret Ministry of Justice or Ministry of Defence memos claiming that torture is, in fact, lawful if the President (or Prime Minister) says

²³ Five of the dozens of such responses that PCATI has received in the past seven years are quoted in PCATI, *Ticking Bombs*, pp.18, 28, 37, 54, 80-1. See fn.16.

²⁴ See, for example, PCATI, *Ticking Bombs*, pp.8, 28, 37, 80-1. See fn.16.

²⁵ Letter no 537-0087-2002 of 7 March 2002 (concerning Jihad Shuman) and letter no 2699-0087-2001 of 21 February 2002 (concerning Nasser Mas’ud ‘Ayyad), from Adv Talia Sasson, Head of the Special Tasks Division at the State Prosecutors Office, to Hannah Friedman, PCATI Executive Director.

²⁶ See, for example, *Serious Criminal File 1147/02, State of Israel v al-Sayyid* (Tel-Aviv District Court), verdict, 22 September 2005; for example, para. 21-3, where Justice Sokolov concludes: ‘I have been convinced that the accused was defined as a “ticking bomb” for professional considerations’. Elsewhere the term is used over half a dozen times, mostly in quotations or citations from GSS interrogators.

²⁷ Supreme Court Sitting As High Court of Appeals, Criminal Appeal 2005/06, *Abd al-‘Aziz ‘Amer v the State of Israel*, ruling of 23 May 2008, para 16; Supreme Court, Additional Criminal Hearing, 9423/08 *Anon v State of Israel*, decision of 24 May 2009. In both cases, the Court uses, between quotation marks, the term ‘necessity interrogation’.

²⁸ The person who investigates interrogees’ complaints. That person is an employee of the GSS, which explains his tendency – actually, this practice has been followed in 100% of cases to date – of accepting only those components of complaints that the GSS considers as true, and rejecting all of the components they deny. See fn.27. [Footnote added to original.]

²⁹ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin. Addendum: Mission to Israel Including Visit to Occupied Palestinian Territory, UN Doc. A/HRC/6/17/Add.4, 16 November 2007, para. 19. [Footnote added to original.] Israel’s latest report to the Committee against Torture reveals nothing more serious than a reprimand. See UN Doc. CAT/C/ISR/4, 12 December 2007, para. 27(a).

³⁰ Although there is no legislation criminalising torture as such, a fact criticised repeatedly by the UN Committee against Torture. See, recently, the Concluding Observations of the Committee against Torture: Israel, UN Doc. CAT/C/ISR/CO/4, 14 May 2009, para. 13.

so or arguing that interrogation methods not causing ‘organ failure, impairment of bodily function, or even death’³¹ cannot be considered torturous be any more successful. Rather, under the system created by the Supreme Court ruling in the Torture Case, torture is legalised far more discreetly and discretely: through a low-key, almost bureaucratic process of what may be called case-by-case decriminalisation.

But legalized it nevertheless is.

3. Practice: GSS interrogation methods and torture in international law

3.1 *Interrogation methods*

In a submission to the UN Committee against Torture in late 2008, the PCATI listed GSS interrogation methods employed within the system that the ruling created as follows:

Consistent allegations made by Palestinian detainees in detailed affidavits to the Public Committee Against Torture in Israel and to [Israeli human rights NGOs] B’Tselem and HaMoked, have described the use of methods which clearly constitute torture under the Convention’s definition and the jurisprudence of international tribunals and human rights monitoring bodies. In several cases these allegations have been substantiated by internal GSS/ISA memoranda, by testimony of GSS/ISA interrogators in court and by medical evidence.³² These methods include, but are not limited to, the following: prolonged incommunicado detention; sleep deprivation by means of continuous or nearly continuous interrogation for periods exceeding 24 hours (for example 46 hours with a two hour break after 25 hours);³³ forcibly bending the detainee’s back over the seat of a chair at an acute angle, often with the legs shackled to the feet of the chair, and keeping the suspect bent backwards in an arch until the pain is unbearable; slapping and blows; coerced crouching in a frog-like position; tightening handcuffs on the arms near or above the elbows and pressing or pulling the handcuffs, causing the arms to swell and often injuring the radial nerves; threats of arrest and physical abuse of family members, exposing a suspect to a parent or spouse being abusively interrogated or exposing a family member to a son or brother exhibiting signs of physical torture. Three or more GSS/ISA interrogators are invariably present when employing the physical methods of

³¹ Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, US Department of Justice, Office of the Legal Counsel, Re: Standards of Conduct for Interrogation under 18 USC §§ 2340-2340A, 1 August 2002, posted, for example, at the Washington Post website, <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>, on 14 June 2004. Last accessed 14 June 2004.

³² Public Committee Against Torture in Israel, *Back to a Routine of Torture: Torture and Ill-treatment of Palestinian Detainees during Arrest, Detention and Interrogation, September 2002-April 2003* (Jerusalem: PCATI, written by Yuval Ginbar, June 2003); Public Committee Against Torture in Israel, *Ticking Bombs – Testimonies of Torture Victims in Israel* (Jerusalem: PCATI, written by Noam Hoffstadter, May 2007); B’Tselem and HaMoked, *Absolute Prohibition: The Torture and Ill-Treatment of Palestinian Detainees* (Jerusalem: B’Tselem and HaMoked Center for the Defense of the Individual, written by Yehezkel Lein, May 2007), pp.63-70; Public Committee Against Torture in Israel, ‘*Family Matters*’ – *Using Family Members to Pressure Detainees* (Jerusalem: PCATI, written by Aviel Linder, March 2008).

³³ See PCATI, *Ticking Bombs*, p.60. See fn.16.

torture and they usually employ more than one method, repeatedly, against the same detainee.³⁴

A detailed description of the interrogation methods is impossible within the confines of this paper: the reader is referred to PCATI's reports and other sources cited here. However, short descriptions produced by victims of four of the methods are given below, followed by descriptions produced by GSS interrogators. It is important to bear in mind that the methods are, more often than not, used repeatedly and in combination with others, including incommunicado detention and sleep deprivation.

Slapping and blows - from the affidavit of Muhammad 'Abd a-Rahman Zeid:

this time 5 GSS agents entered the room who began beating me to death. They threw me on the floor and started kicking me all over my body. This continued until my clothes were torn and I fainted.³⁵

'Crouching' - from the affidavit of Hassan 'Abd a-Rahman Hassan Ledadiyah:

Afterwards, they released the shackles and I was commanded to sit in a 'frog' position – to sit on my toes, with my knees partially bent, for 45 consecutive minutes, and all the while my hands were shackled behind me. Each time that I would lose strength and fall, or lower my foot to the floor, one of the interrogators would lift my body and the second would slap me and beat me on the soles of my feet.³⁶

Tightened shackling - from the affidavit Mustafa 'Ali Hammad Abu-Mu'amar:

the interrogators released my hand shackles and covered my arms with pieces of sponge, and then closed the shackles over the sponge higher up along my arms, not near my hands. Afterwards, two interrogators grabbed me, one arm each, and began tightening the shackles with force, which blocked my arteries, and after ten minutes of pressure like that my arms swelled very much, to the point that they were unable to remove the handcuffs from them.³⁷

³⁴ PCATI, *Israel - List of concerns for UN Committee Against Torture*, Jerusalem, September 2008, http://www2.ohchr.org/english/bodies/cat/docs/ngos/PublicCommittee_Israel42.pdf. Last accessed 13 June 2009. The long quotation from this, and PCATI and OMCT's subsequent briefing (PCATI, OMCT - World Organisation Against Torture, *Israel – Briefing to the UN Committee Against Torture*, Jerusalem & Geneva, April 2009, available at http://www2.ohchr.org/english/bodies/cat/docs/ngos/PCATI_OMCT_Israel42.pdf, last accessed 13 June 2009), may be justified by the fact that I was the principal author of this submission. Footnotes are shortened from the original.

³⁵ From the affidavit of Muhammad 'Abd a-Rahman Zeid, taken by Atty. Fida' Qa'war on 22 January 2003. See PCATI, *Back to a Routine of Torture*, p.60. See fn.32.

³⁶ From the affidavit of Hassan 'Abd a-Rahman Hassan Ledadiya, taken by Atty. Ahmad Mustafa Amara on 9 August 2006. See PCATI, *Ticking Bombs*, p.79. See fn.16.

³⁷ From the affidavit of Mustafa 'Ali Hamad Abu Mu'amar, taken by Atty. Ahmed Amara, 31 July 2006. See PCATI, *Ticking Bombs*, pp.86-7. See fn.16.

Forcing the detainee to bend backwards - from the affidavit of Bahjat Yamen:

the first method was to handcuff me from behind, with my legs tied backwards under the chair. The interrogator would push me back so that I was sitting on the seat while leaning backwards, and at the same time they kept beating me on the stomach. This position was maintained for about fifteen minutes, and then the interrogator would forcefully yank me forward... I simply felt terrified, and I had excruciating pains in my back and I felt that my back was about to really break, and I yelled and cried and begged, but the torture did not stop.³⁸

While PCATI cites its own and other human rights NGOs' reports, which, in turn, rely mostly on torture victims' testimony, the use of most of these methods has been acknowledged by Israeli officials: GSS interrogators, prosecutors, judges and Ministry of Justice officials (see below). In passages from minutes in two cases heard in separate District Courts,³⁹ which have come into the possession of the author only recently, several GSS interrogators describe and discuss torture methods such as 'tilting of the torso'⁴⁰ (the same method PCATI describes as 'bending the detainee's back'), 'slapping'⁴¹ and 'standing' (with knees bent),⁴² as well as 'crouching,'⁴³ and 'half-crouching.'⁴⁴ It should be noted that different interrogators use identical terms to denote torture techniques that, when asked, they describe identically. It is clear that these are well-rehearsed methods, far from the 'improvisation' when 'interrogators act in a single case from a sense of "necessity"' (Supreme Court ruling, para. 36 and 38, respectively) that the Supreme Court envisaged.

Thus, a senior GSS interrogator described, to an Israeli District Court, methods used during an interrogation session that he did not attend (but was in charge of):

Adv. Goldner (prosecutor): ... you of course were not present during the application of the measures detailed in N/2, but maybe you can tell us how it works.

³⁸ From affidavit of Bahjat Yamen from 26 December 2004, taken by Attorney Labib Ghassan Habib at the Shata Prison. See PCATI, *Ticking Bombs*, p.14. See fn.16. It should be noted that both a GSS/ISA memorandum shown to Mr Yamen's attorney, and a military judge, confirmed that 'special measures', justified by the 'defence of necessity' were used in his interrogation. From the affidavit of Attorney Labib Habib, 31 August 2004, quoting a memo signed by 'Alias Rani, Interrogation Team Leader, Southern Samaria'. See also *Bahjat Fathi Yusef Yamen v Military Prosecutor Request 3029/05*, Petition to Order Removal of Classified Status regarding Information Relating to the Petitioner's Interrogation and Interrogation of the Main Prosecuting Witness. See PCATI, *Ticking Bombs*, p.16. See fn.16.

³⁹ *Serious Criminal File 1147/02 State of Israel v al-Sayyid*, Tel-Aviv District Court. As noted, the verdict in this case was handed down on 22 September 2005; *Serious Criminal File 77/04. State of Israel v 'Amer 'Abd 'al-'Aziz*, Jerusalem District Court. The verdict in this case was handed out on 29 December 2005. The reader will notice that citations and quotations from the minutes do not include indication of the date of the hearing, nor of the exact page number. This is because I only possess excerpts from the minutes, rather than the full texts. However, the accuracy of the passages is uncontested.

⁴⁰ See testimonies of GSS interrogators 'alias "Sinai",' *al-Sayyid*, minutes, pp.517-522, 563-4, and 'alias "Naveh"', *al-Sayyid*, minutes, p.761, and 'alias "Dotan"', *'Amer*, minutes, pp.156-8, 517-522, 563-4.

⁴¹ See testimonies of 'alias "Sinai",' *al-Sayyid*, minutes, pp.517-522, 701-2, and 'alias "Naveh",' *al-Sayyid*, minutes, p.761, and 'alias "Sagiv"', *al-Sayyid*, minutes, p.1245, and 'alias "Dotan"', *'Amer*, minutes, pp.156-8.

⁴² See testimonies of 'alias "Naveh"', *al-Sayyid*, minutes, p.761, and 'alias "Sagiv"', *al-Sayyid*, minutes, p.1245, and 'alias "Dotan"', *'Amer*, minutes, pp.156-8.

⁴³ See testimony of 'alias "Dotan"', *'Amer*, minutes, pp.156-8.

⁴⁴ See testimony of 'alias "Naveh"', *al-Sayyid*, minutes, p.716.

A: Ok, if we're talking about applying a slap, then a slap is with the hand. A slap. (demonstrates) Regarding the tilting of the torso it's about the interrogee sitting on a chair, with the backrest to his side, I mean, he sits on a part [of the chair] ... and we tilt his sitting position at an angle of 45 degrees more or less for a fixed period.⁴⁵

Another interrogator succinctly described to the same Court (while demonstrating) the method of 'half-crouching': 'We request [*sic*] the interrogee to stand pressed against the wall, to keep his legs together, to do this with his legs, this is half-crouching.'⁴⁶

As early as 2002, less than three years into the system, 'P', a GSS interrogator, was able to provide a summary of sorts: when asked, by an Israeli journalist, about torturing in situations 'defined as ticking bombs', he replied, *inter alia*: 'Here you use all possible manipulations up to shaking and beating, and you will beat the hell out of him. To say that it always succeeds? – it doesn't.'⁴⁷

3.2 *Is it torture?*

Under international law, both torture and other cruel, inhuman or degrading treatment or punishment are prohibited at all times, in all circumstances and without exception. This prohibition is found in international human rights and international humanitarian law treaties, and reflects customary international law.⁴⁸ However, torture does have legal implications that cruel, inhuman or degrading treatment or punishment do not: notably, the duty of states to criminalise torture and exercise universal jurisdiction over suspected torturers,⁴⁹ duties which do not extend to all forms of cruel, inhuman or degrading treatment or punishment. To defend my argument that what the Supreme Court ruling created is a system of 'legalized *torture*', and counter Israel's contention that it does not torture (see immediately below), I will now attempt to show that GSS interrogation methods do constitute torture under the leading international legal definition, which binds Israel. This, bearing in mind that a finding that a particular person was 'merely' exposed to ill-treatment that is cruel, inhuman or degrading does not make it in any way lawful.

Israel has consistently claimed, on various grounds, that GSS interrogation techniques do not amount to torture, as have other states regarding their own techniques (notably, the USA under

⁴⁵ Testimony of 'alias "Sinai"', *al-Sayyid*, minutes, pp.517-522. Note the 'we': this is clearly a group activity, another indication of the institutionalisation of the methods.

⁴⁶ Testimony of 'alias "Naveh"', *al-Sayyid*, minutes, p.761. The minutes state that 'alias "Naveh" was "demonstrating"', but there is no indication in the text what movements he made. However, in view of victims' descriptions and the name interrogators have given to this technique, 'like this' in all likelihood indicates bending the leg into a half-crouching position.

⁴⁷ Amit Navon, 'Stories from the Interrogation Rooms' [Hebrew] *Maariv Weekend Supplement* (5 July 2002). The earlier quotation is from the question asked.

⁴⁸ This point is not contested by many, and by even fewer since the demise of the Bush administration. See Ginbar, *Why Not Torture Terrorists?*, Part IV, Chapter 18. See fn.8.

⁴⁹ See for instance Articles 5-9 of the UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment, adopted by the UN General Assembly, Resolution 39/46, UN Doc. A/Res/39/46, 10 December 1984, entered into force 26 June 1987. Israel has been a State Party to this Convention since 1991. Universal jurisdiction over torture is also a rule of customary international law.

President Bush).⁵⁰ States seem, in such cases, to imply what the US August 2002 memorandum stated explicitly: that only the harshest forms of physical and mental brutality qualify as torture.⁵¹ I submit that the question of whether this argument is sound can be addressed without entering into any detailed definitional or interpretational discussion of what constitutes ‘torture’ and what distinguishes torture from ‘cruel, inhuman or degrading treatment or punishment’ under international law.⁵² The definition of torture I will use in this discussion is that of Article 1(1) of the UN Convention against Torture:

For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

It is undisputed that this definition contains four relevant elements:

- (1) The element of intention. The act (causing pain and suffering) was intentional.
- (2) The element of severe pain or suffering. The act caused the victim severe⁵³ pain or suffering, whether physical or mental.
- (3) The element of purpose (or discrimination).⁵⁴ The act was performed for a certain purpose, including obtaining information from the victim.
- (4) The element of official involvement. The act was performed or instigated by officials or, at least, with official consent or acquiescence.

Interrogation methods are, by their very nature, intentional acts, performed for the purpose of obtaining information. The fact that the GSS methods concerned have been applied by officials is uncontested. Therefore, three of the four elements listed above are indisputably present, including the element of purpose. The issue of severity, then, remains the only contentious one. The practice of international and regional human rights monitoring bodies and courts shows that they have consistently rejected any ‘maximalist’ positions on the severity element. Elsewhere, I have detailed dozens of cases, drawn from international case law and reports by human rights

⁵⁰ In the case of Israel, see, for example, an Israeli delegate’s words before the Human Rights Committee: ‘before 1999 it had been a practice of the ISA to use moderate physical pressure—though never torture—when interrogating persons suspected of terrorism’ (Human Rights Committee, Summary Record of the 2118th Meeting, 25 July 2003, UN Doc. CCPR/C/SR.2118, 6 August 2003, p.7).

⁵¹ Memorandum from Jay S. Bybee, assistant secretary general, to Alberto R. Gonzales, White House counsel, ‘Regarding Standards of Conduct for Interrogation under 18 USC. §§ 2340-2340A’, 1 August 2002, pp.1, 5-6. Available at <http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr6.html>.

⁵² For detailed discussions see for instance Nigel S Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (3rd Edition) (Oxford: Oxford University Press, 2009), pp.85-124; Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture. A Commentary* (New York: Oxford University Press, 2008), pp.66-77, 557-559

⁵³ All relevant international and regional treaties that define torture require that the pain or suffering be ‘severe’ in order to constitute torture, with the exception of the definition of torture in Article 2 of the Inter-American Convention to Prevent and Punish Torture.

⁵⁴ The latter is not relevant to our discussion.

monitoring bodies and experts, where, arguably, ‘subtler’ forms of ill-treatment were inflicted; nevertheless, these bodies have found the ill-treatment to constitute torture, concluding that:

It is obvious ... that international bodies have over the years provided extensive jurisprudence to clarify and, as it were, illustrate the definition of torture in general and the concept of severity therein in particular. The result may not be a crystal clear picture of what ‘severe’ means (especially since it is recognized that individual sensitivities and circumstances play a role), but I believe it may be safely concluded that while a certain, not trivial, level of severity is definitely required for torture to be found, the notion that only acts such as mutilations, death, rape and bone-crushing can amount to torture is firmly rejected.⁵⁵

The theoretical legal thinking that, I believe, supports the consistent findings of UN bodies and experts (i.e. that GSS interrogation techniques – and similar ones – constitute torture), will be explored before citing such findings. These techniques appear less brutal than the ones mentioned above, but it should be borne in mind that killing or severely and instantly traumatising an interrogee would defeat the purpose of the interrogation; it is, therefore, hardly surprising that ‘softer’ methods have been, and are being, used far more frequently and systematically, both for these practical reasons and – in particular by western states – in an attempt to avoid the stigma of torture.

The paradigmatic international legal case concerning such interrogation techniques was the 1970s case *Ireland v UK* at the European Commission and Court of Human Rights. The case concerned interrogation methods employed by British forces in the interrogation of IRA suspects in Northern Ireland in 1971. Not only has this case been cited, or discussed, in virtually every academic work on the subject (too numerous to list), but also in dozens of court cases (again, too numerous to list) addressing issues such as what torture is. This case was cited, and even relied on, in the Torture Case ruling that established Israel’s current system.⁵⁶ The five techniques, employed against fourteen men in August and October 1971,⁵⁷ now read like a (partial) list of methods employed by the GSS and, previously, by the USA. They were described by the European Court as follows:

- (a) *wall-standing*: forcing the detainees to remain for periods of some hours in a ‘stress position’, described by those who underwent it as being ‘spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers’;
- (b) *hooding*: putting a black or navy coloured bag over the detainees’ heads and, at least initially, keeping it there all the time except during interrogation;
- (c) *subjection to noise*: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
- (d) *deprivation of sleep*: pending their interrogations, depriving the detainees of sleep;

⁵⁵ Ginbar, *Why Not Torture Terrorists?*, p.294. See fn.8. The survey of the jurisprudence is at pp.288-294.

⁵⁶ Torture Case ruling, para. 30.

⁵⁷ Twelve arrested on August 9 and two in October (*Ireland v UK*, Series A No 25 (1978), para. 96). The Court stresses that the ‘techniques were not used in any cases other than the fourteen’.

- (e) *deprivation of food and drink*: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.⁵⁸

The Court stated that the techniques were applied ‘with intermittent periods of respite ... during four or possibly five days’, noting that it was not possible ‘to establish the exact length of the periods of respite’.⁵⁹ The Court famously found that the ‘five techniques’ were unlawful but did not constitute torture:

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.⁶⁰

Did a major jurisprudential shift occur between the European Court’s findings regarding Northern Ireland in 1978 and subsequent findings – for instance, the concluding observations of the UN Committee against Torture (CAT) regarding Israel in 1997, which found similar techniques to constitute torture – or else do the two findings reflect different definitional approaches of the two bodies? I submit that it is not necessary, at least for the present, limited purpose, to pit the findings against one another.

I believe that Sir Nigel Rodley’s observations (albeit in different capacities: one on the methods used under the Landau system, the other on those used under the US ‘war on terror’ system) offer the most reasonable and convincing approach to this issue.⁶¹ In 1997, commenting on the Landau methods in his capacity as UN Special Rapporteur on torture,⁶² Rodley stated that

Each of these measures on its own may not provoke severe pain or suffering. Together – and they are frequently used in combination – they may be expected to induce precisely such pain or suffering, especially if applied on a protracted basis of, say, several hours.⁶³

Writing in his academic capacity (in 2006), having listed ‘a number of techniques approved by the US Secretary of Defence for possible use by interrogators’,⁶⁴ Rodley goes on to state that

⁵⁸ *Ireland v UK*, para. 96. See fn.57. The Court had not conducted any research and based its conclusions solely on the findings of the Commission, which gave a slightly more detailed description of the techniques. See *Ireland v UK*, *Yearbook* 1976, pp.512–949, 784.

⁵⁹ *Ireland v UK*, (Court), para. 104, cf *Ireland v UK* (Commission), p.788. See fn.57.

⁶⁰ *Ireland v UK* (Court), para. 167. See fn.57.

⁶¹ Even though it does not fully accord with Rodley’s view of how the definitional debate should ideally be settled. See Human Rights Committee, Summary Record of the 2118th Meeting, pp.123-4. See fn.51.

⁶² Which he describes as ‘sitting in a very low chair or standing arced against a wall (possibly in alternation with each other); hands and/or legs tightly manacled; subjection to loud noise; sleep deprivation; hooding; being kept in cold air; violent shaking’. Report of the Special Rapporteur on torture to the Commission on Human Rights, UN Doc. E/CN.4/1997/7, 10 January 1997, para. 121.

⁶³ Report of the Special Rapporteur. See fn.62.

⁶⁴ Nigel S. Rodley, ‘The Prohibition of Torture: Absolute Means Absolute’, (2006) *Denver Journal of International Law & Policy* 34, p.148. Rodley names the following methods: hooding; sleep adjustment; false flag; threat of transfer; isolation for up to 30 days; forced grooming; use of stress positions, such as prolonged standing; removal of clothing; increasing anxiety by the use of aversions (e.g. presence of dogs); and deprivation of light/auditory stimuli (i.e. sensory deprivation techniques) (p.147).

‘Any combination of them, especially over a protracted period of time would certainly “amount to” torture. Many of these techniques have been used at Guantánamo.’⁶⁵ Rodley does not find the interrogation methods in question torturous *prima facie*; rather, he requires a certain accumulation of methods and length of application before describing them as torture. I submit, following what Rodley seems to imply, that unlawful methods of interrogation may be, very roughly, divided into two types: those that are inherently torturous (i.e. whose very use constitutes torture, such as rape, bone-crushing and applying electric shocks to sensitive parts) and those that could, in theory, be applied so as to produce only mild pain and suffering, and where it is only through their application over time, alongside other methods (or both), that they would produce severe pain or suffering. Most of the methods discussed in this section belong to the second category.

Incommunicado detention provides a relevant illustration of these points. Under both the Israeli and US systems, incommunicado detention has been used as an interrogation method,⁶⁶ as well as a facilitator for other methods.⁶⁷ It is reasonable to expect that, *ceteris paribus*, a prisoner’s pain and suffering arising from being totally cut off from the rest of the world would increase the longer he or she is kept in this condition: such suffering is likely to be negligible for a few hours, minimal for a few days, but, as weeks and months accumulate, it will, at some point, become severe. The particular point at which this occurs may vary; for Palestinian detainees in Israel, where incommunicado detention can extend to weeks, but seldom to months, that method may not, if applied on its own (which it seldom, if ever, is) amount to torture.⁶⁸ In contrast, persons held incommunicado for years would invariably suffer severely, even setting aside the use of other methods; therefore, suspected terrorists held for years in the CIA’s ‘black sites’ were clearly tortured even by that method alone.⁶⁹ This cumulative logic appears to lie behind several statements by the UN Commission on Human Rights; for instance, ‘prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture.’⁷⁰

The same logic is expressed, this time explicitly, in a finding of torture by the Human Rights Committee in an individual case:

the Committee notes, from the information before it, that Mohammed El-Megreisi was detained incommunicado for more than three years, until April 1992, when he was allowed a visit by his wife, and that after that date he has again been detained

⁶⁵ Rodley, ‘The Prohibition of Torture’, p.148.

⁶⁶ See Ginbar, *Why Not Torture Terrorists?*, Part III, Chapter 12, Sections B(2) and B(4). See fn.8.

⁶⁷ The UN Special Rapporteur on torture, recognising that ‘torture is most frequently practised during incommunicado detention’ has also called for such detention to be made illegal (UN Doc E/CN.4/2002/76, 27 December 2001, Annex 1). This point is revisited, regarding Israel, below.

⁶⁸ See UN Special Rapporteur on torture, UN Doc. E/CN.4/2001/66, 25 January 2001, para. 665.

⁶⁹ They were also clearly the victims of enforced disappearance as defined, for example, in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, adopted by UN General Assembly resolution 71/177 on 20 December 2006 (for text see, for example, the website of the Office of the High Commissioner for Human Rights: <http://www.ohchr.org>), and as a crime against humanity in Article 7(1)(i) of the Rome Statute of the International Criminal Court (although other requirements for such a crime have probably not been met).

⁷⁰ UN Doc. E/CN.4Res.2004/41, adopted without vote on 19 April 2004, para. 8. See similarly Resolution 2005/39, 19 April 2005, para. 9; the Inter-American Court of Human Rights, *Velasquez Rodríguez Case*, Judgment of July 29, 1988, Inter-American Court of Human Rights (Series C) No 4 (1988), para. 187; repeated in *Godínez Cruz Case*, Judgment of January 20, 1989, Inter-American Court of Human Rights (Series C) No 5 (1989), para. 197.

incommunicado and in a secret location. Having regard to these facts, the Committee finds that Mr. Mohammed Bashir El-Megreisi, by being subjected to prolonged incommunicado detention in an unknown location, is the victim of torture and cruel and inhuman treatment, in violation of articles 7 and 10, paragraph 1, of the Covenant.⁷¹

It is the accumulation of time (i.e. its ‘prolonged’ nature) that made the incommunicado detention cruel and inhuman; the fact that it was inflicted for years was clearly material in the finding of torture.

Therefore, although the European Court did not explicitly state this, and although it might have been better if it had, it is unreasonable to interpret the *Ireland v UK* ruling as determining that ‘the five techniques’ were *inherently* non-torturous: namely, that no matter how long interrogators deprive a detainee of sleep, force him to stand, hood him, etc. (days, weeks or months on end) these methods could never, either separately or in combination, amount to torture.

And although the CAT, when it concluded (in 1997) – following Rodley – that the Landau methods⁷² ‘are in the Committee’s view breaches of article 16 and also constitute torture as defined in article 1 of the Convention’,⁷³ it did not explicitly state this, and although it might have been better if it had, it is unreasonable to interpret its conclusions as implying that the Landau methods were *inherently* torturous: namely, that no matter how short the duration – even if interrogators used a single method, such as hooding or shackling to a small chair, on its own and for a very brief period – it would always constitute torture, just like rape, the breaking of bones, the rack or the screw.

Rather, it may reasonably be suggested that each of these bodies found that specific interrogation methods, which were neither inherently torturous nor inherently non-torturous, amounted to torture *as practised in specific circumstances for specific durations and in specific combinations* (or did not, as the case may be). As laid out in greater detail elsewhere,⁷⁴ the Israeli Landau methods, even according to official sources, were more numerous and used in combination for periods several times longer than the ‘four or possibly five days’ of the British ones. It is not inconceivable, therefore, that the difference between the findings reflects a gap in the perceived severity of the methods used in the two interrogation systems, rather than in the definitional approaches of the two bodies.

While it must be borne in mind that, regardless of whether or not they are found to constitute torture, such interrogation methods were invariably found (either as torture or as cruel, inhuman or degrading treatment) to be unlawful and subject to a non-derogable prohibition under international law,⁷⁵ the following two points sum up where international law stands on the

⁷¹ Human Rights Committee, *El-Megreisi v Libyan Arab Jamahiriya*, Communication No 440/1990, UN Doc. CCPR/C/50/D/440/1990 (1994), para. 5.4.

⁷² ‘These methods include: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill’. UN Doc A/52/44 (1997), para. 256-7.

⁷³ See fn.72. The Committee added, significantly, that ‘This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case.’

⁷⁴ See Yuval Ginbar, *The Face and the Mirror: Israel’s View of its Interrogation Techniques Examined*, LLM Dissertation, University of Essex.

⁷⁵ See Ginbar, *Why Not Torture Terrorists*, Chapter 18. See fn.8.

question of whether or not interrogation techniques such as those currently employed by the GSS constitute torture:

1. *These methods may constitute torture.* If officials intentionally inflict pain on detainees for the purpose of extracting information, they are already very close to torturing; the only element left to be established is that the pain inflicted is ‘severe’.
2. *Whether or not these methods cause ‘severe’ pain depends, inter alia, on their duration and combination.* Such methods may not be inherently torturous, but used over time, in combination, or both, they will become exactly that. The particular point at which this happens would depend, *ceteris paribus*, to a large extent on the two cumulative aspects: duration and combination.⁷⁶

This is where the legal formula ends and an assessment of specific methods as applied (i.e. their nature, duration and accumulation), as well as the disposition of the specific victim, must begin. However, I submit that it is also here that the hitherto sidelined (albeit necessarily present) element of purpose comes to the fore.

GSS interrogators are allowed to inflict pain and suffering only for a specific purpose, and only within a specific situation (i.e. a TBS), defined by the Supreme Court ruling as an extreme situation necessitating the extraction of urgently-needed information to save many innocent lives. The interrogators therefore work under the assumption that, if the purpose of the interrogation is not achieved, death and destruction will follow. In these circumstances, duration is likely to be stretched and methods accumulate as long as information is not forthcoming, rendering the interrogee’s resultant pain and suffering severe. This, according to the finding of expert bodies, is, in fact, what has happened in Israel (and elsewhere). The workings of this tortuous logic were described by Lord Gardiner several decades ago; his words are as relevant and appropriate now as they were then:

If it is to be made legal to employ methods not now legal against a man whom the police believe to have, but who may not have, information which the police desire to obtain, I, like many of our witnesses, have searched for, but have been unable to find, either in logic or in morals, any limit to the degree of ill-treatment to be legalized. The only logical limit to the degree of ill-treatment to be legalized would appear to be whatever degree of ill-treatment proves to be necessary to get the information out of him, which would include, if necessary, extreme torture.⁷⁷

The observations of UN experts have reflected this. In 2001, referring to methods used by the GSS after the Supreme Court ruling, the UN Special Rapporteur at the time (Rodley), observed that

⁷⁶ Cf the European Court in *Selmouni v France*: ‘The Court considers that this “severity” is, like the “minimum severity” required for the application of Article 3, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.’ See *Selmouni v France*, Reports 1999-V, Judgment of 28 July 1999, para. 100.

⁷⁷ Report of the Committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism, Command No 4901 (Lord Parker of Waddington, Chairman 1972), Minority report by Lord Gardiner of Kittisford.

The Special Rapporteur's hope[s] that the 1999 decision of the High Court of Justice would result in an end to the use of interrogation techniques involving torture or cruel, inhuman or degrading treatment... have proved to be ill-founded. The use of 'moderate physical pressure' and other torturous techniques appears still in evidence[.]⁷⁸

The CAT spoke, on two occasions, of 'numerous' 'allegations of torture and ill-treatment' by the GSS.⁷⁹ Both the Special Rapporteur⁸⁰ and the CAT⁸¹ found the not-dissimilar interrogation methods used by the USA, in its 'war on terror', to constitute torture. Unlike the USA, however, Israel's interrogation methods have not undergone any changes recently. The conclusion of this discussion may, therefore, be summed up in five words: Israel is a torturing state.

4. Conclusion: No cause for celebration

Uniting the conclusions from the two parts of this essay makes for grim, indeed doubly grim, reading: Israel is a state where torture is practised legally.

This should be sufficient, I hope, to foreclose approval, let alone celebration, of this state of affairs by most proponents of human rights and the rule of law. However, it must be conceded that the Supreme Court's ruling was greeted by several academics, and other interested parties, as the ideal solution to the 'ticking bomb' dilemma, combining as it does (or rather, as the foregoing demonstrates, purports to do) the preservation of international law's absolute prohibition of torture with a domestic legal way of allowing torture to be used in the extreme, 'rare' cases in which it is the only way to save lives. The ruling seems to fit neatly into theories such as Sanford Levinson's 'Precommitment' and 'Post-Commitment'⁸², and Oren Gross and Fionnuala Aoláin's idea of 'ex post facto ratification'⁸³ (a discussion of which is beyond the scope of this essay);⁸⁴ both, roughly speaking, accept the value of the absolute prohibition, while calling for exceptions in 'ticking bomb' and similar situations.

The idea that TBSs would only occur 'rarely' collapsed, in the case of Israel, as early as July 2002, less than three years after the ruling, when it was officially announced that ninety

⁷⁸ UN Doc. E/CN.4/2001/66, 25 January 2001, para. 665. The Special Rapporteur added: 'The Special Rapporteur accepts that not all allegations will be well founded. Nevertheless, as long as the Government continues to detain persons incommunicado for exorbitant periods, itself a practice constituting cruel, inhuman or degrading treatment ... the burden will be on the Government to prove that the allegations are untrue. This is a burden that it will not generally be able to discharge convincingly.'

⁷⁹ See Reports of the Committee against Torture, UN Doc A/57/44 (2002), para. 52(g), and UN Doc. CAT/C/ISR/CO/4, 14 May 2009, para. 19. The Human Rights Committee stated that it was 'concerned that interrogation techniques incompatible with article 7 of the Covenant are still reported frequently to be resorted to': UN Doc. A/58/40 (Volume I, 2002-3), para. 85(18).

⁸⁰ *Situation of detainees at Guantánamo Bay*, UN Doc. E/CN.4/2006/120, 15 February 2006, para. 52. See para. 49-51 for the Committee's description of the authorised techniques.

⁸¹ See UN Doc. CAT/C/USA/CO/2, 18 May 2006, para. 24.

⁸² Sanford Levinson, "'Precommitment' and 'Post-Commitment': The Ban on Torture in the Wake of September 11", (2003) *Texas Law Review* 81, p.2048.

⁸³ Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006), pp.137-142.

⁸⁴ See the discussion of these, and other theories and expressions of support for the ruling, in Ginbar, *Why Not Torture Terrorists?*, especially Chapters 10 and 20. See fn.8.

Palestinians, defined as ‘ticking bombs’, had been interrogated using ‘exceptional means of interrogation’ (that is, as we have seen, torture) between September 1999 and July 2002.⁸⁵ This means that dozens of TBSs at least were believed to occur annually (at a time when dozens of murderous suicide bombs were actually being detonated), which greatly contributed to the institutionalisation of torture. Some of those who initially supported the ruling may withdraw their support because of the institutionalisation and legalisation issues; others argue that the fault lies in the improper implementation of the 1999 ruling, rather than in the ruling itself. However, it should be noted, in this last regard, that the Supreme Court has consistently lent support to the implementation of its ruling *in practice*. It has, as yet, to grant a single one of the hundreds of petitions requesting the lifting of a GSS order to deny interrogees access to their lawyer.⁸⁶ The Court allowed such effective incommunicado detention, even when it ran to 45 days.⁸⁷ This has rendered submitting such petitions almost invariably an exercise in futility, and led PCATI to limit the numbers of such petitions drastically.⁸⁸

Worse, the Supreme Court’s endorsement of torture practices in Israel has manifested itself in a case in which it allowed the continued incommunicado detention of a detainee against whom, in the State’s own words, ‘at the beginning of the Petitioner’s interrogation physical force was applied’.⁸⁹ Worse still, the Court refused to allow that detainee – the torture victim – to meet his counsel, even though the State informed counsel (bizarrely, through the Supreme Court itself) ‘that as of the time of the hearing in HCJ 9271/04 no physical force was being applied, and that it is impossible to know what will happen in the future’:⁹⁰ in other words, further torture was not ruled out. The Court did not see fit even to comment either on the past torture or on the possibility of it recurring, let alone to prohibit such torture. Its only comment was to justify the detainee’s continued isolation (which had facilitated his torture and could, at that point, facilitate further torture) in terms of none other than ‘the interest of the interrogation’: ‘We were convinced that the issuance of the order prohibiting the Petitioner from meeting his Counsel is necessitated by the interest of the interrogation and the security of the area.’⁹¹ The Supreme Court, it appears, has no qualms about allowing the torture system that it created a decade ago to operate without interference.

To my mind, however, the ‘original sin’ lies in the Supreme Court’s abandonment, in its 1999 ruling, of the moral principle behind international law’s absolute, no-justifications⁹² prohibition of torture, in favour of a cost-benefit, ‘lesser evil’ approach, reflected in the ‘defence of

⁸⁵ Amos Harel, ‘GSS Has Used “Exceptional Interrogation Means” 90 Times Since 1999 HCJ Ruling’, *Haaretz* (25 July 2002). No similar official figures have been provided since, but, according to PCATI, ‘there is no doubt that the figures have consistently risen.’ In their briefing to the CAT, the PCATI and OMCT added that ‘torture, not to mention ill-treatment not amounting to torture, go far beyond the so called “ticking bomb” or “necessity” cases.’ See PCATI, *Israel - List of concerns for UN Committee Against Torture*, p.3. See fn.34.

⁸⁶ See PCATI/OMCT briefing, PCATI, *Israel - List of concerns for UN Committee Against Torture*, p.2. See fn.34.

⁸⁷ HCJ 11097/07 *Muhammad ‘Abd al-‘Aziz v Head of the GSS*, decision of 28 December 2007.

⁸⁸ PCATI/OMCT briefing, PCATI, *Israel - List of concerns for UN Committee Against Torture*, p.2. See fn.34

⁸⁹ Attorney Eran Helman, Senior Deputy A to the State Attorney, *Response by the Respondent in HCJ 9625/04 ‘Imad Salah ‘Abd al-Fateh Qawasmeh v the General Security Service*, 25 October 2004, para. 6.

⁹⁰ See fn.89.

⁹¹ HCJ 9271/04 *‘Imad Salah ‘Abd al-Fateh Qawasmeh v The General Security Service*, decision of 17 October 2004.

⁹² Article 2(2) of the UN Convention against Torture reads, ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.’

necessity’ (as interpreted by the Supreme Court): a moral approach that lies at the heart of all justifications of torture in extreme cases (such as a TBS).⁹³ When the international community agreed, in a legally binding treaty (which Israel later ratified), that torture must not be inflicted even ‘[i]n time of public emergency which threatens the life of the nation’,⁹⁴ it clearly was not guided by a ‘lesser evil’ rationale. Rather, it was driven, as it had been in proclaiming the Universal Declaration on Human Rights, in the immediate wake of the Second World War and under its indelible impression, by a firm commitment to ‘never again’ allow nations, and humans, to commit atrocities upon one another in the name of some greater good.⁹⁵

‘Never again’ was also invoked in the run-up to the UN decision, in 1947, to allow the establishment of a Jewish state in Palestine.⁹⁶ However, within Israel a different kind of ‘never again’ mentality has since reared its ugly head – ‘never again’ as licence to use, in the name of defending that state and its people, absolutely any means against absolutely anyone, including the innocent and the helpless. The Supreme Court, unfortunately, lent support to this view in its ruling, providing a cloak of legality, thereby a cloak of legitimacy, to one of humanity’s worst crimes: torture. If ‘never again’ is understood, rather (the way I believe it must), in its original sense, as reflecting core universal values, among them the unqualified rejection of certain ways of treating humans – *any* humans – the 10-year-old torture system, created by Israel’s Supreme Court, is little short of a betrayal.

⁹³ See Ginbar, *Why Not Torture Terrorists?*, Part I. See fn.8.

⁹⁴ International Covenant on Civil and Political Rights, adopted by the General Assembly, Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976, Article 4(1), and see Art 4(2) for the ‘non-derogation’ clause.

⁹⁵ See, generally, the excellent discussion in Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania, 1999), Chapter II. See, specifically on the prohibition on torture, p.42. A moral framework for justifying the absolute prohibition on torture, which I have termed ‘minimal absolutism’, is proposed and elaborated in Ginbar, *Why Not Torture Terrorists?*, Part I. See fn.8.

⁹⁶ UN General Assembly resolution 181, 29 November 1947.